Faurecia Exhaust Systems, Inc. *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Region 2-B. Cases 8–CA–37192, 8–CA–37229, and 8–CA–37354

September 30, 2008

DECISION AND ORDER REMANDING

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On April 2, 2008, Administrative Law Judge Ira Sandron issued the attached decision, finding that the Respondent violated Section 8(a)(1) of the Act by announcing a rule prohibiting employees from posting union literature in the production plant's lunchroom without management permission. The judge further found that the Respondent violated Section 8(a)(3) and (1) by warning and suspending employee Marvin Blue when Blue asked two coworkers to obtain for him the names, addresses, and telephone numbers of unit employees, for use in a union organizing campaign.[1] The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order Remanding.[2]

1. The judge found that the Respondent's production supervisor, Jeff Lovejoy, violated Section 8(a)(1) by "announc[ing] a rule" to employees, shortly after finding a union leaflet posted in the assembly plant's lunchroom. Specifically, Lovejoy told employees that they could not post union literature anywhere in the lunchroom without the Respondent's permission and that they could be discharged if they disregarded this rule. The Respondent excepts, and we find merit to those exceptions.

At the time Lovejoy made the posting announcement, the Respondent's work force was governed by a series of work rules set forth in an employee handbook that all employees received when hired. One of the work rules prohibits solicitation and distribution and states, in relevant part, "[t]here shall be no distribution of literature by employees in any work area at any time." Another rule, identified in the handbook as work rule 34, pertains to "posting" and states that "[t]here shall be no posting of notices, letters, or printed material of any description on Company property by an employee unless approved by the Human Resources department."

In finding that Lovejoy's statement violated Section 8(a)(1), the judge applied the Board's standard for determining whether workplace no-distribution rules are lawful. The complaint, however, did not allege an unlawful prohibition against distribution of union literature; nor is there evidence that Lovejoy said anything to employees about their right to distribute union literature. Rather, the complaint alleged an unlawful posting prohibition—specifically, that by "orally promulgating a rule that employees could not post union literature or other literature in the lunchroom . . . without seeking permission from Respondent's management," Lovejoy violated Section 8(a)(1).

In accord with the complaint allegation, we have assessed Lovejoy's statement under the legal standard applicable to no-posting rules. Under this standard, an employer may lawfully prohibit the posting of union literature anywhere on its property, provided that it does not engage in unlawful discrimination. Absent evidence of discrimination, a rule requiring management permission before posting is not unlawful. See *Flamingo Hilton-Laughlin*, 330 NLRB 287, 287 (1999) (dismissing allegation that respondent violated Sec. 8(a)(1) by maintaining a "policy requiring prior management approval before any employee posts a written notice on the hotel's premises").

Here there is no evidence that the Respondent's no-posting rule was applied in a discriminatory manner. Further, as the judge found, Lovejoy's prohibition of lunchroom postings was simply a "reiteration" of the existing posting prohibition set forth in work rule 34, and there is no evidence that the Respondent previously allowed employees to post materials without management permission. Finally, we reject the judge's reliance on the timing of the announcement—on the same day that the Union first distributed flyers to employees—as demonstrating an antiunion motivation. In this connection, the announcement naturally coincided with the violation of the preexisting and valid no-posting rule. For these reasons, we find that Lovejoy's statement to employees did

[1] The judge dismissed allegations that the Respondent violated Sec. 8(a)(1) by prohibiting employee Guadalupe Montez from wearing a union T-shirt, and Sec. 8(a)(3) by discharging Montez. No exceptions were filed to these dismissals.

The Respondent, however, excepts to the judge's failure to dismiss the 8(a)(1) T-shirt allegation on the additional grounds that it was time barred by Sec. 10(b). We agree with the judge that, in light of his dismissal of this 8(a)(1) allegation on the merits, it is unnecessary to address the Respondent's 10(b) defense.

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

not violate Section 8(a)(1), and we shall dismiss this allegation.

2. In May 2007, the Respondent suspended employee Marvin Blue and issued him a warning for the stated reason that he violated several handbook rules by "persistently and improperly pressur[ing] a number of other employees to provide to [him] lists of employee names and phone numbers." Applying the legal analysis set forth in *Wright Line*,[3] the judge found that the suspension and warning violated Section 8(a)(3) and (1). For the reasons set forth below, we find it necessary to remand the 8(a)(3) allegations to the judge for further analysis under *Wright Line*.

At the request of the Union, Blue began soliciting union support among employees in December 2006. The Respondent stipulated that it immediately became aware of Blue's soliciting activity, and an internal management email that month advised HR Director John Plenzler that Blue was "beginning to call and harass many employees while pushing the praises of the [Union]." There is no evidence that the Respondent took any action against Blue at this time in response to his union soliciting.

In April 2007, the Union asked Blue to obtain employees' names, addresses, and phone numbers. Blue, in turn, asked gap leaders Jennifer Samples and "Meechy" to obtain this information for him because he believed they sometimes worked in the office where the information was kept.[4] Samples reported Blue's request to the Respondent's plant manager. The Respondent allegedly concluded from Samples' report that Blue was seeking to surreptitiously circumvent the "personnel records" provision of the employee handbook, which assures employees that their "personnel information will not be released to outside parties without [their] permission." Accordingly, the Respondent suspended and warned Blue, purportedly because he engaged in conduct unprotected by the Act.

Where, as here, an employer is charged with violating Section 8(a)(3) by taking adverse action against an employee for engaging in Section 7 activity, the Board applies the test in *Wright Line* to determine whether the violation has been established. Under *Wright Line*, the General Counsel must first show by a preponderance of the evidence that protected activity was a motivating factor in the employer's adverse action. If this is established, the burden shifts to the employer to show that it would have taken the same adverse action even in the absence of the protected activity. See, e.g., *SFO Good-Nite Inn, LLC*, 352 NLRB 268, 269 (2008).

Cases analyzing adverse action under *Wright Line* are treated as presenting either a question of "dual motivation" or one of "pretext." In a dual motivation case, the "employer defends against a § 8(a)(3) charge by arguing that, even if an invalid reason might have played some part in the employer's motivation, the employer would have taken the same action against the employee for a permissible reason." *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005). If the employer cannot demonstrate, by a preponderance of the evidence, that it would have taken adverse action against the employee for the permissible reason, then its rebuttal defense fails and a violation will be found. In a pretext case, i.e., a case in which the "reasons given for the employer's action are . . . either false or not in fact relied upon . . . the employer fails by definition to show that it would have taken the same action for those reasons, and thus there is no need to perform the second part of the *Wright Line* analysis." *SFO Good-Nite*, supra, slip op. at 2. See also *Rood Trucking Co.*, 342 NLRB 895, 897–898 (2004).

Here, the judge found that the General Counsel satisfied his initial burden under *Wright Line*. That part of the judge's analysis is clear to us. What is not clear, however, is the judge's *Wright Line* analysis in rejecting the Respondent's rebuttal defense. Specifically, we cannot discern whether it is based on a dual-motivation analysis or a pretext finding.

As explained, the Respondent's defense to the 8(a)(3) allegation is that Blue engaged in statutorily unprotected conduct, in disregard of a handbook rule that shields employees from unauthorized disclosure of their confidential personnel information, by surreptitiously attempting in May to obtain employees' names, addresses, and phone numbers from individuals who were not authorized to release this information. The judge rejected this defense by finding that Blue's request for the employees' contact information was protected. However, the judge further found that:

> [E]ven assuming arguendo that Blue's conduct in seeking employees' names and phone numbers was unprotected, the Company's internal emails make it clear that Respondent expressed hostility toward Blue for his union activity months previously. I have to conclude that Respondent's motive for disciplining Blue in May was based at least in substantial part on his soliciting coworkers to support the Union, activity that went back to December 2006 and was undeniably protected. Accordingly, his suspension violated the Act, even assum-

[3] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[4] There are no exceptions to the judge's finding that gap leaders are employees, and not statutory supervisors.

Throughout much of his decision, the judge mistakenly refers to Samples as Sales.

ing arguendo that his attempts to obtain employees' names and phone numbers were unprotected.

By stating that Blue's discipline in May was based "at least in substantial part on his soliciting" activity in December, the judge seems to apply a dual-motive analysis by indicating that the Respondent's motive for disciplining Blue was based *both* on his allegedly unprotected conduct in May and on his "undeniably protected" soliciting activity in December. Of course, the discipline would not be unlawful under *Wright Line* if his conduct in May was deemed unprotected and if the Respondent established that it would have disciplined Blue for that conduct regardless of his protected activity in December. But having found a violation, the judge may have concluded that the Respondent failed to make this required showing.

Alternatively, the judge's discussion could be read as resting on a finding of pretext, i.e., that the Respondent's asserted reason for disciplining Blue—his May conduct—was "false or not in fact relied upon." *SFO Good-Nite*, supra, slip op. at 2. A possible finding of pretext underpinning the judge's analysis also is suggested by the judge's finding, elsewhere in his decision, that the Respondent engaged in disparate treatment by disciplining Blue.

In sum, because we are unable to discern the precise analytical basis for the judge's conclusion that the Respondent did not meet its *Wright Line* rebuttal burden of demonstrating that Blue was lawfully disciplined, we cannot determine at this time whether the judge correctly found that the Respondent violated Section 8(a)(3) by disciplining Blue. Therefore, we shall sever the complaint allegation concerning Blue's discipline, and remand this issue to the judge. On remand, the judge should explain which analytical framework under *Wright Line* he meant to apply, reanalyze the 8(a)(3) allegation under that analysis, and specify the evidence relied on in reaching that conclusion.

ORDER

The National Labor Relations Board orders that the complaint be dismissed insofar as it alleges that the Respondent violated Section 8(a)(1) of the Act by orally promulgating a rule that employees could not post union literature or other literature in the lunchroom without seeking permission from the Respondent's management.

IT IS FURTHER ORDERED that the complaint allegation that the Respondent violated Section 8(a)(3) and (1) by suspending and warning Marvin Blue in May 2007 is severed from this case and remanded to the administrative law judge for further appropriate action consistent with this decision.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision, after which the provisions of Section 102.46 of the Board's Rules shall be applicable.

Rudra Choudhury, Esq., for the General Counsel.
Michael A. Snapper and *Keith J. Brodie, Esqs. (Barnes & Thornburg LLP),* for the Respondent.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. The amended consolidated complaint dated October 31, 2007, stems from unfair labor practice (ULP) charges that International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Region 2-B (the Union or UAW) filed against Faurecia Exhaust Systems, Inc. (Respondent or the Company). The alleged violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) relate to unrepresented production workers at Respondent's Toledo, Ohio facility.

Pursuant to notice, I conducted a trial in Toledo, Ohio, on January 15–16, 2008, at which the parties had full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. I have duly considered the General Counsel's and Respondent's helpful posthearing briefs.

Issues

Did Respondent violate Section 8(a)(3) and (1) by the following conduct against the named employees because they engaged in union activity.[1]

1. Terminated Guadalupe (Lupe) Montez on March 27.

2. Suspended Marvin Blue on May 11, and issued him a written warning on May 16.

Did Respondent violate Section 8(a)(1) by the following conduct.

1. In about late December 2006, by then Site Manager Jack Caccioppo, orally promulgated, and since that time has maintained, a rule prohibiting temporary employees from wearing union insignia clothing at work.

2. On that same occasion, by Caccioppo, orally warned Montez about wearing union insignia clothing at work.

3. On May 16, by Human Resources (HR) Manager John Plenzler (Plenzler),[2] threatened Blue with termination if he engaged in further union activity.

4. On about July 26, by Production Supervisor Jeff Lovejoy, promulgated an overly-broad distribution rule, to wit, that employees could not post union literature in the lunchroom (or breakroom) without management's permission.

5. On that same occasion, by Lovejoy, threatened employees with termination if they violated such a rule.

[1] All dates hereinafter occurred in 2007, unless otherwise specified.
[2] Not to be confused with Eric Plenzler, a supervisor at the facility.

Witnesses and Credibility

The General Counsel's witnesses, other than undisputed agents of Respondent it called pursuant to Section 611(c), were Blue and Montez, and former employee Jeromy Finley.

Respondent called Caccioppo, Lovejoy, and Plenzler, as well as quality engineer Bryan Kennedy and former gap leader Jennifer Samples. Respondent has admitted the supervisory and agency status of all of these individuals but Samples.

Credibility resolution is crucial in determining the merits of the allegations. In making my credibility findings, I have considered witness demeanor, the plausibility of testimony, and the evidentiary principle of corroboration. As to the last element, both the General Counsel's and Respondent's cases were deficient.

Thus, the General Counsel provided no corroboration of Montez' testimony that he wore a union T-shirt at work in December 2006, and that Caccioppo told him to remove or cover it up; that he voiced prounion sentiment at a monthly employees' meeting in March (attended by 11–12 employees, by his account); or that he asked for and received permission to leave early on March 23. According to Montez, Blue was among the welders present at 2 p.m. that day when he asked Sales for such permission,[3] but Blue did not testify on the matter. This raises the suspicion that Blue's testimony would not have been corroborative, and I therefore draw an adverse inference against the General Counsel on this point. See *Palagonia Bakery Co.*, 339 NLRB 515, 538 (2003); *Dalikichi Sushi*, 335 NLRB 622, 622 (2001); *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. mem. 861 F.3d 730 (6th Cir. 1988).

I rejected the General Counsel's proffered affidavit of ex-employee Michael Chaney,[4] whom the General Counsel subpoenaed but was unable to locate. I found that its admission, in the absence of its maker, would have been fundamentally unfair to Respondent, especially when Respondent had terminated Chaney for failing a drug test prior to the time he gave his statement. In light of his discharge, he had a potential bias against Respondent, about which Respondent would have had no opportunity to inquire on cross-examination. Further, as I noted on the record, the General Counsel chose to rest instead of pursuing its option to seek subpoena enforcement in Federal district court.

Even if the General Counsel were to successfully appeal my ruling, the affidavit addressed only the events of March 23, and did not touch on Montez' contentions that he engaged in union activity. Moreover, as to March 23, the affidavit (GC Exh. 23 at 2) stated that Montez asked Sales at about 11:20 a.m. for permission to leave early, inconsistent with Montez' testimony that he asked for permission at 2 p.m. and then again at 2:30 p.m.

Conversely, Respondent did not elicit testimony from anyone whom Blue allegedly "harassed" in about May by asking them to obtain employee information for the Union, for which he received a suspension and a warning. Notably, one of those persons was Sales, whom Respondent called as a witness but did not question about Blue.

For reasons to be stated, I do not find that Sales, a gap leader at relevant times, was a statutory supervisor. Nevertheless, she had firsthand knowledge of the incidents on which Respondent based the imposition of discipline on Blue, and I conclude that she would have been reasonably expected to testify for Respondent about them. Respondent's counsel's decision not to question Sales regarding Blue's activities raises the suspicion that her testimony would have been unfavorable to Respondent, and I therefore draw an adverse inference against Respondent on the matter. See *Palagonia Bakery Co.*, supra; *Dalikichi Sushi*, supra; *International Automated Machines,* supra.

I recognize the well-established precept that credibility finding is not an all-or-nothing proposition; witnesses may be found partially credible, since merely because a witness is discredited on one point does not automatically mean that he or she must be discredited in all respects. *Dalikichi Sushi,* supra at 622; *Golden Hours Convalescent Hospitals*, 182 NLRB 796, 799 (1970). Instead, the trier of fact may appropriately weigh the witness' testimony with the evidence as a whole and evaluate its plausibility. *Golden Hours*, supra at 798–799; see also *MEMC Electronic Materials,* 342 NLRB 1172, 1200 fn. 13 (2004).

I now turn to the credibility of the two alleged discriminatees. Montez was not a credible witness, even aside from lack of corroboration. His testimony was often confusing, contradictory, or implausible, and even evasive, especially as to the events of March 23 that formed the sole basis for his termination.

He first testified that on March 23, he had a conversation with Sales at 2 p.m., in which he requested and received permission to leave early. However, he subsequently testified that she ignored him when he asked at 2 p.m., and that he had a second conversation with her at 2:30 p.m.

His testimony that he was finished with all of his work when he asked her to leave at 2 p.m. was contradicted by his later testimony that he returned to his work area to "double-check" whether everything was done. In this regard, he testified that after the 2 p.m. conversation, he mopped the floors. He equivocated on why he performed this work, and his answers were conflicting. He stated that he did it voluntarily and that it was not part of his regular job assignments, yet he also testified that Sales assigned employees to mop the floors and that "I had to mop the floor . . . before I left."[5]

Finally, as to March 23, timecard records show that he punched out at 2:19 p.m.,[6] contradicting his testimony that he spoke to Samples at 2:30 p.m.

I find implausible his testimony that Sales totally ignored him when he asked to leave early at 2 p.m. and that she routinely ignored him when he asked her questions. Also implausible and stilted was his account of the March monthly employees' meeting, at which he allegedly engaged in the following dialogue with Caccioppo. The latter asked, "Do you really think we need a union here as good as we're going?" and Montez replied, "Yes, I think it would be a good idea to have a un-

[3] Tr. 330.

[4] Rejected GC Exh. 23.

[5] Tr. 335.

[6] See R Exh. 7. The parties so stipulated. Tr. 482.

ion."[7] This testimony strikes me as self-serving and farfetched, particularly in light of Montez' averment that in December 2006, Caccioppo warned him against wearing a T-shirt with union insignia.

I further find suspect his testimony that on the one day he allegedly wore a union T-shirt at work, he "just simply forgot"[8] for the first time to wear the employer-issued orange vest that he was required to have on at all times in work areas.

Finally, Respondent's Exhibit 2 is a written warning dated March 5 that Montez received. At his termination interview on March 26, he told Plenzler that he had no prior reprimands. When asked on cross-examination why he had said this, Montez replied that he had not recalled the incident, hardly believable when it occurred earlier in the same month.

Accordingly, I do not credit Montez where his testimony conflicted with that of Respondent's witnesses, Samples, in particular.

In contrast, Blue was generally credible and consistent, and I do not doubt his honesty, despite his lack of precise recall, especially as to the specifics of everything Lovejoy said at the July employees' meeting in the lunchroom. As was the case with Finley, his testimony blurred the distinction between solicitation and distribution. However, I do not expect rank-and-file employees to be cognizant of the nuances of the law pertaining to distinctions between the two types of activity.

Sales was Respondent's only witness who was directly involved in the underlying situations that led to Montez' termination and Blue's suspension. As to the events of March 23 pertaining to Montez, Sales appeared candid and readily answered questions posed to her. I do not believe that she would have fabricated an incident to use against him, and I credit her version of what occurred over his.

All of Respondent's other witnesses were admitted supervisors and agents, and I have evaluated their credibility in light of what I have stated above. They were generally consistent, with one exception. Both Plenzler and Caccioppo testified that the former was the final decisionmaker regarding Montez' termination. On the other hand, a document that Lovejoy prepared after his termination meeting with Montez indicates that Lovejoy made the decision.[9]

Facts

Based on the entire record, including witness testimony, documents, and the parties' stipulations, I find the following facts.

Respondent, a Delaware corporation and subsidiary of a business enterprise headquartered in France, has an office and place of business in the facility. Respondent has admitted jurisdiction, and I so find.

The facility, which operates in conjunction with Respondent's plant in Troy, Ohio (Troy West or TW), receives unassembled components for exhaust systems from TW, assembles them, and then ships them out to customers, in particular, Chrysler and Dodge. As reflected in the organizational chart,[10] TW is a parent plant with overall authority over the facility. Thus, HR Manager Plenzler, whose office is at TW, has responsibility for hiring, new employees' orientation, terminations, and other normal HR functions at both plants. The production employees' handbooks at each are identical. All permanent production employees are issued copies of the handbook and acknowledge receipt. The parties stipulated that at all times material, the provisions in the 2007 handbook (the handbook)[11] applied, including work rule provisions (work rules).

The production or hourly employees at the two plants are not represented by a labor organization, in contrast to some of Respondent's other locations. Including temporary employees, TW has a little less than 300 production or hourly employees, and the facility has about 36. Temporary employees work side-by-side with regular employees and are treated the same as far as assignments and job duties.

Both plants have two categories of production employees: welder and material handler (or sequencer). Welders, who are higher paid,[12] work on an assembly line, where they weld components for exhaust systems and perform related functions; and material handlers receive, move, and pack products, largely in the "supermarket," the area where materials are kept.

At times material, Caccioppo, as site manager, was the highest-ranking manager at the facility. Each of the three shifts had a production supervisor and a gap leader, and approximately six welders and four material handlers. On first shift, Lovejoy was the supervisor and Sales the gap leader. The first shift also had a maintenance person. In addition, two salaried people worked in the office, one of whom was quality engineer Bryan Kennedy.

I. GAP LEADER SALES' STATUS

The job description of a gap leader generated by Respondent's high-level management beyond Ohio essentially describes lead person-type functions.[13]

Caccioppo was the sole witness to testify about gap leader functions at all times relevant, and I credit his following unrebutted testimony. Gap leaders were paid at the welder rate plus 30 cents an hour. Their responsibilities were to train new employees, organize the activities of the production line, assign people to specific tasks, and monitor standardized work processes. They had no role in determining how many hours a shift would work or how many employees would be needed, or in authorizing overtime. They did not fill in for absent shift supervisors; a role that Caccioppo or other supervisors performed. If gap leaders observed any performance problems, they conferred with supervisors, who determined the course of any further action. In this regard, when Sales concluded that Montez had breached company policy on March 23, she reported it to Lovejoy, the shift supervisor, who decided what steps to take next.

For the most part, welders had preset rotation schedules and rotated every 1–2 hours. Gap leaders did have occasion to

[7] Tr. 293.
[8] Tr. 382.
[9] GC Exh. 17.
[10] GC Exh. 2.
[11] GC Exh. 3.
[12] Welders were paid about $15 an hour; material handlers started at $12 an hour.
[13] R. Exh. 5. Compare, job description of "production supervisors," R. Exh. 6.

make reassignments if an employee was absent or had to leave early, based on their assessment of the capability of individual employees. However, welders and material handlers were trained to perform all the functions of their respective positions, and only new employees might have been unable to do so.

The party asserting that an employee has supervisory status within the meaning of Section 2(11) of the Act has the burden to establish it by a preponderance of evidence. *Kentucky River Community Care*, 532 U.S. 706, 710–711 (2001); *Masterform Tool Co.*, 327 NLRB 1071, 1071 (1999); *Chevron U.S.A.*, 309 NLRB 59, 72 (1992).

Sales' only potential exercise of supervisory authority would have been in her direction of employees. However, in order to conclude that direction amounts to supervisory responsibility, the record must show that the putative supervisor has the authority to direct work and take corrective action, if necessary, and will suffer adverse consequences if he or she does not take such action. *Oakwood Health Care,* 347 NLRB 404, 411 (2006). As the Board has stated in recent decisions, supervisory direction entails the exercise of independent judgment, as opposed to being merely routine or clerical. *Network Dynamics Cabling,* 351 NLRB 1423, 1425 (2007); *Alstyle Apparel*, 351 NLRB 1287, 1287 (2007).

Here, welders and material handlers, with the exception of new employees, were capable of doing all jobs in their respective classifications. If a gap leader had problems with an individual employee, he or she went to the shift supervisor, who decided what action to take.

Accordingly, I conclude that Sales did not possess authority to direct within the meaning of Section 2(11) or possess any other indicia of supervisory authority. Therefore, she was not a supervisor under the Act.

II. GUADALUPE MONTEZ

On August 30, 2006, Montez began working as a temporary employee, as a quality inspector who inspected mufflers coming off the welders' line.

Montez was represented by the UAW when he worked for a previous employer. Starting in late December 2006, Montez testified, he talked to Blue and other employees in favor of the Union approximately every other day. However, I credit Blue's testimony that he was the one who initiated discussions of the Union with Montez. No other witnesses confirmed that Montez ever spoke to them on the subject, and there is no direct evidence that Respondent knew of any such conversations. On a daily basis, Montez wore a wristwatch from the "Platinum Club," a UAW-sponsored community organization.[14]

According to Montez, he wore a union T-shirt to work on one occasion, in late December 2006.[15] Although Montez testified that other employees were present when Caccioppo told him to take it off or cover it up, no witnesses corroborated his account. I also find stilted and implausible Montez' account of what was allegedly said, to wit, that Caccioppo stated, "You know you're not supposed to be wearing that here;" Montez asked why not, saying it was only a T-shirt; and Caccioppo then stated, "No, it's more than a T-shirt; it's a UAW T-shirt."[16] I do not believe that Caccioppo would have been so clumsy in expressing antiunion sentiment. Montez offered no reason why he all of a sudden decided to wear a union T-shirt to work on that particular occasion, when he had never worn it at the facility before, and the record is devoid of any surrounding circumstances explaining his timing. Finally, Montez conceded on cross-examination that on the day in question, he was not following the requirement that he wear a company-issued orange vest in his work area at the time when Caccioppo approached him.

Caccioppo denied that he ever saw Montez wear a union T-shirt at the facility. For the above reasons, I credit his denial and do not find as a fact that Montez did so.

When Montez started, Kennedy, his supervisor, stated that if he did a good job, he could become permanent. Montez was made a permanent employee on February 19 as a first-shift material handler under Supervisor Lovejoy. One of his main responsibilities was to ensure that the welders' line was fully stocked, and he spent much of his time in the supermarket.

Respondent, usually through Caccioppo, conducted mandatory monthly meetings for employees, both permanent and temporary, for each shift. Montez testified that at the monthly meeting held on March 1, which he attended with about 10–11 other employees, the subject of the Union came up. No other witness corroborated Montez' account of what was said. His description thereof was, once again, artificial and stilted, and self-serving as well (see p. 3, supra). I also consider it peculiar that, if Montez were credited on Caccioppo's alleged antiunion statements to him in December, he would have been so bold in expressing his prounion sympathies at an open meeting.

I asked Caccioppo if he said anything about the Union at any monthly meetings. He readily answered that he did so, at least at the December 2006 meeting, and also volunteered that following the Union's organizing drive in July, he had an "impromptu gathering" of all employees. In December 2006, the gist of his remarks concerned union organizing and what signing an authorization card signified. At more than one meeting, he discussed information that the Union was distributing, as well as why Respondent had a union-free policy and wished to remain union-free. Kennedy substantially corroborated Caccioppo's testimony. The General Counsel has not alleged that any of his statements violated the Act.

Caccioppo, Kennedy, and Lovejoy all testified that Montez did not make any statements at the March 1 meeting, and I credit them.

On March 5, Lovejoy issued Montez a written warning for a safety violation, to wit, making a u-turn that caused a tub of resonators to slide off and flip onto the floor and in the direction of two employees.[17] However, the sole reason that Respondent has advanced for Montez' discharge was job abandonment on March 23.

[14] See GC Exh. 20, which presumably shows the watch.
[15] See GC Exhs. 20 and 21, photographs of the shirt.
[16] Tr. 275.
[17] R. Exh. 2. No specific work rule is cited.

Events of March 23

As stated earlier, Montez' testimony concerning his leaving early on Friday, March 23, contained numerous internal contradictions, conflicted with timecard records (R. Exh. 11), and was uncorroborated. I therefore cannot find reliable his testimony on the subject.

I find the following facts based on Samples' credited testimony. At about 1:30–2 p.m., Montez approached her on the production line. No one else was in the immediate area. He asked if the welders were done, and she replied, "Yes." That was the extent of their conversation. She did not see him again. His shift ended at 3 p.m.

Later, when Samples was "making the rounds" to ensure that everything on the shift was completed, she noticed that the supermarket had not been stocked and that Montez was not there. She unsuccessfully looked around for him. A welder told her that he had gone.

Welders generally finished a little early, and Montez often asked her if they were done. After the welders were through, Montez had other job duties to perform before he was done for the day. Based on Montez' testimony, this included mopping.

Section IX.2 of the work rules provides that the Company has a "'zero tolerance' approach" to certain violations, including, "9. Job abandonment. Defined as walking off the job and leaving the company premises without notification to your immediate line-leader [GAP leader] or Supervisor."

Lovejoy was not at the facility that day. Samples left on his desk a copy of the handbook page containing the above section, placing arrows by zero tolerance and the job abandonment provision. At the top, she hand-wrote, "Jeff—Guadalupe left on Friday after *7 hr.* day. Did not notify me or Jack [Caccioppo] that he was leaving!" (Emphasis in original.)[18]

Montez' Termination

Lovejoy read Samples' note the following Tuesday, March 27. He then checked payroll records and communicated with Samples, Caccioppo, and Plenzler. Plenzler testified that the zero-tolerance notification policy is based on fire safety: should there be a fire and an employee has not notified management that he/she is leaving the building, firefighters' lives could be endangered because of the mistaken belief that the employee is still inside and needs rescue.

Lovejoy terminated Montez that afternoon for job abandonment.[19] Typed in the comments box was: "On Friday 3/23/07, Guadalupe clocked out at 2:15 p.m. without asking or receiving approval from his supervisor GAP leader or Site Manager." The document is not signed by Montez, who received nothing in writing. I credit Montez' unrebutted testimony that Lovejoy stated that Samples had said there was a miscommunication between her and Montez.

After the termination, Lovejoy prepared an email[20] (the addressee is not clear), stating that Montez had been terminated for job abandonment and that at the time of the termination interview, Montez claimed it was a miscommunication between Samples and him. The email went on to state that it was clear to Lovejoy that Montez was fully aware he was going home without permission.

Plenzler's testimony clarified that Montez' offense was not in leaving early per se, but in failing to provide notification thereof: he explained that Respondent has a "no-fault" attendance policy, meaning that attendance points are assessed for leaving early, but no disciplinary action is otherwise imposed. Plenzler was inconsistent as far as who made the decision to terminate Montez. He first testified unequivocally that he was the final decisionmaker but later testified that Lovejoy's post-termination email was "forwarded to me for approval of termination."[21]

Plenzler, Caccioppo, and Lovejoy all denied having any knowledge of Montez' union support or activities at the time of his termination.

No other employees have been terminated at the facility for job abandonment. However, three employees at TW were terminated for that reason in April–June 2007.[22] In one, the employee apparently walked out and said he was not coming back; in the other, the employee took extended breaks three times in one night. The third is silent as to the underlying facts.

Jeromy Finley, who became a permanent welder in April 2007, was terminated in December 2007, for failing a drug test in apparent violation of another of Respondent's "no tolerance" policies, possession or consumption of intoxicating beverages and/or controlled substances.

III. MARVIN BLUE

When he worked for a previous employer, Blue served as a UAW shop steward. He has been a welder for the Company since June 2006, with Lovejoy his immediate supervisor at all times. In about October or November 2006, the Union contacted Blue about organizing Respondent's employees, and at around that time, he first talked to other employees on the subject.

The facts set out in the following two paragraphs are based on Blue's unrebutted and credible testimony. I again note that Respondent's counsel asked Samples no questions about Blue, even though he called her as a witness. Moreover, Respondent did not call any other employees who allegedly complained about Blue's harassing them for information.

In early 2007, Blue had a conversation in the parking lot with gap leader, Sales, and welder Eric Taylor, prior to the beginning of the shift. Blue stated that he sometimes thought the employees needed a union. Samples replied that if Cappiocco heard him talk about unions, he could get terminated.

In early April, the Union asked Blue to obtain employees' names and phone numbers. Later that month, Blue asked "Meechy," the night-shift gap leader (whom Respondent no longer employs), if he could get that information for Blue to pass on to the UAW. Meechy said that he would try. On or about May 9, Blue, in a telephone conversation, made the same request to Samples, who also replied that she would try. He testified that he asked them because he trusted them and be-

[18] GC Exh. 16.
[19] See GC Exh. 15, dated March 29.
[20] GC Exh. 17.
[21] Tr. 489, 510.
[22] R. Exhs. 10–12.

lieved that, as gap leaders, they had access to the information; in the regular course of their duties, they spent time in the supervisors' office.

On the morning of May 11, at the conclusion of his morning break, Blue was called to a meeting in the conference room with Caccioppo, Lovejoy, and Kennedy. Caccioppo stated that Blue was suspended until further notice, for violating company policy by harassing people for names and phone numbers. Caccioppo gave no specifics, and Blue denied any wrongdoing.

On the morning of May 16, Lovejoy called Blue and told him to come to a meeting in the conference room that afternoon. Blue did so. Present were Caccioppo and Lovejoy, with Plenzler participating by conference call.

Plenzler read Blue verbatim the contents of General Counsel's Exhibit 14, a memo dated May 16, 2007, from Plenzler to Blue, and signed by Plenzler and Caccioppo. The memo states that the Company received complaints regarding Blue's behavior and the requests he made of other employees for employee lists and phone numbers. The matter was fully investigated and the determination made that Blue had violated the following provisions of the handbook when he "persistently and improperly pressured a number of other employees to provide to you lists of employee names and phone numbers:" section 1.2–harassment/sexual harassment, and section 1.3–productive work environment.

Relevant portions of those sections are as follows:

> 1.2–Harassment/Sexual Harassment; the opening paragraph states that the Company "has established a strict policy prohibiting unlawful harassment (racial, national origin, color, disability, religious, age, sexual, sexual orientation) of employees, including implied or expressed forms of sexual harassment"
>
> . . . .
>
> 1.3–Production Work Environment Policy; in particular, "Any behavior that causes an intimidating, threatening or unsafe environment is unacceptable. Examples of unacceptable behavior may include the use of profanity, gossip, and/or the spreading of rumors, physical intimidation, creation of unsafe conditions and mental harassment."
>
> Plenzler further stated that Blue's "attempts to obtain employee phone numbers was an attempt to violate Section 1.10 of the handbook, which protects the confidentiality of employee records. You have no right to such information from company records, and your actions threatened the privacy of your fellow employees as well as company policy."
>
> Section 1.10 relates to personnel records. The relevant paragraph states, "Your personnel record is considered confidential. Other than verification of employment, personnel information will not be released to outside parties without your permission ."
>
> . . . .

Plenzler warned Blue that any further violation of those policies would subject him to discipline up to and including termination, asked him to sign the memo, and stated that he would have his job back. Blue signed it. I credit Blue's unrebutted testimony as follows. Blue then stated that he wanted it on record that he supported the Union and knew his rights. Plenzler acknowledged that there was "activity" in December 2006 and January, of which Blue was part.

Plenzler next told Blue he could return to work the following day and would be paid for the time he was suspended. Blue lost no pay or other benefits as a result of the suspension.

The parties stipulated that General Counsel's Exhibit 18 is comprised of the only documents that Respondent furnished in response to the following portion of the General Counsel's subpoena duces tecum: all employees at the facility who were disciplined for harassment and/or sexual harassment during the period from July 26, 2005–July 26, 2007.

General Counsel's Exhibit 18 shows that only one employee other than Blue has been disciplined for that reason: Matt Kirshner, who in October 2006 received a 1-day suspension for making racist remarks to other employees. Respondent provided no documentation that it has disciplined anyone other than Blue for misconduct pertaining to the work environment or confidentiality of employee records.

The parties stipulated that management knew of Blue's union activities beginning on about December 13, 2006. An email of that date referred to Blue's "persistence" in talking to other employees about the union, and reflected management's concern over this.[23]

Soon afterward, Plenzler, by email dated December 19, 2006, directed supervisors to investigate the "complaints" against Blue.[24] In that email, he also stated that "I would like to finalize a date to meet with the workforce regarding our Union Free Policy as this is heating up quickly."

In an email from Plenzler to Caccioppo dated May 3, 2007—8 days before Blue's suspension—entitled "Union Activity," Plenzler discussed reports of (unnamed) employees soliciting support for the Union and expressed his opinion that "the union is coming after us in strength."[25]

In an email dated May 15, 2007, after Blue's suspension, Caccioppo advised Plenzler that regarding the third shift, Blue had been "very pro-Union in his discussions and comments all the time" with one employee but had not asked him for any information.[26]

Finally, Supervisor Eric Plenzler, in an email dated July 27, 2007, to Supervisors Lovejoy and Tonia Carter, stated that a change in labeling employee lockers "may not be a good idea with all of the union stuff going on. Marv [Blue] has already been disciplined for trying to get the names of all of the hourly people, why should we make it easier for him to obtain this information?"[27]

IV. JULY 26, 2007 MEETING

The complaint limits the alleged violation to Lovejoy's oral promulgation of a rule that employees could not post union literature or other literature in the lunchroom without seeking

[23] See GC Exh. 5 at 1. See also GC Exh. 6.
[24] GC Exh. 7.
[25] GC Exh. 8.
[26] GC Exh. 9.
[27] GC Exh. 13 at 2.

permission from Respondent's management. Therefore, I need not address what Lovejoy might have said about solicitation, as opposed to distribution.

As background for this meeting, two provisions in the handbook are relevant:

Section 1.14, which provides, inter alia, that "Only authorized personnel are permitted to post, remove, or alter any notice on the bulletin boards. If you would like to post a notice, you should see your Human Resources Representative for proper instructions." In practice, only company documents are posted on the bulletin boards.[28]

Work rule 34, which states: "There shall be no posting of notices, letters, or printed material of any description on Company property by an employee unless approved by the Human Resources department."[29]

For about a week starting on July 26, UAW representatives engaged in distributing a prounion flyer to employees at the outside of the facility.[30] At some point on the morning of July 26, someone taped one of the flyers to the smaller bulletin board or grease board in the lunchroom.[31] Later that morning, Lovejoy held a meeting with first-shift employees, including Blue and Finley.

Blue and Finley varied somewhat, both internally and between each other, on the specifics of what Lovejoy said, possibly because they understandably lack familiarity with the legal distinction between "solicitation" and "distribution." Although Lovejoy testified, he did not address the meeting or, a fortiori, rebut anything Blue and Finley said thereon.

Vis-à-vis Finley, Blue appeared to have a greater recall of what Lovejoy stated at the meeting, and I credit Blue's testimony as follows. Lovejoy produced the union flyer and stated that someone had taped it to the bulletin board in the lunchroom, it was not allowed to be hung up in the lunchroom without company authorization, and an employee who did so without authorization could be terminated.

Analysis and Conclusions

The 8(a)(1) Allegations

I have not credited Montez' testimony about a December 2006 conversation with Caccioppo concerning Montez' wearing of union insignia clothing. Accordingly, I recommend dismissal of the allegations concerning such. In light of this, I need not address Respondent's contention (R. Br. at 18) that these allegations are time barred under Section 10(b) of the Act.

As to the allegation that on May 16, Plenzler threatened Blue with termination if he engaged in further union activity, Plenzler referred to company rules and did not mention the Union except in response to Blue. He spoke in the context of the written warning that Blue was already in the process of receiving. I therefore conclude that any such threat is effectively subsumed by the warning and does not constitute the basis for a separate independent 8(a)(1) violation.

Finally are the allegations that on July 26, Lovejoy orally promulgated a rule that employees needed management's permission to post union literature in the lunchroom, and threatened employees with termination if they violated such a rule.

To the extent that Lovejoy's statements encompassed the bulletin boards, he was merely reciting existing policy, more specifically, section 1.4 of the handbook, which stated that employees needed to get permission to post anything on them. Only company documents have been posted on the bulletin boards. Nothing in the record establishes that employees seeking to post union literature on them have been treated disparately, since there is no evidence that any employees have ever asked for permission to post anything. See *Register-Guard*, 351 NLRB 70 (2007); contrast, *Gallup, Inc.*, 349 NLRB 1213, 1213 (2007); *St. Francis Medical Center*, 340 NLRB 1370, 1378 (2003).

However, according to both Blue and Finley, Lovejoy's prohibition against posting in the lunchroom without authorization was not limited to the bulletin boards, which constituted a specific vehicle for management's communications and in practice were exclusively used for that purpose. Rather, Lovejoy prohibited employees from posting anything in the lunchroom without management's permission.

Essentially, Lovejoy reiterated the policy set out in work rule 34, limiting it to the lunchroom—where the union flyer had been posted. As such, he was not "promulgating" a new rule but, instead, partially restating an existing one. Therefore, I conclude that the nomenclature of "announced" is more appropriate than the "promulgated" terminology in the complaint.

Absent special circumstances, employees have a right to distribute union literature in nonwork areas on nonworktime. See *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 619–621 (1962). Moreover, an employer may not require employees to secure its permission as a precondition to engaging in protected concerted activities on employees' free time and in nonwork areas. See *Brunswick Corp.*, 282 NLRB 794, 795 (1987); *Enterprise Products Co.*, 265 NLRB 544, 554 (1982).

The timing of Lovejoy's announcement—on the same day that the Union first distributed flyers to employees in an effort to organize them—as well as his specific reference to the flyer lead to the indisputable conclusion that his motivation was to interfere with the employees' right to engage in protected activity, not for any bona fide business reason. Cf. *Albertson's, Inc.*, 351 NLRB 254, 259 (2007); *Lutheran Heritage Village-Livonia*, 343 NLRB 346, 346 (2004) (a work rule not on its face restrictive of employees' Section 7 rights is nonetheless unlawful if it is a response to union activity).

I therefore conclude that Respondent violated Section 8(a)(1) of the Act when Lovejoy announced a rule that employees could not post union literature anywhere in the lunchroom without first getting management's permission, and threatened employees with termination if they did not comply.

Blue's Suspension and Warning, and Montez' Termination

The framework for analyzing alleged violations of Section 8(a)(3) is *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must make a prima facie

[28] Testimony of Blue and Finley.

[29] GC Exh. 3 at 37.

[30] GC Exh. 11.

[31] See GC Exh. 10, an internal management email. In the room, there is also a larger, glass-enclosed bulletin board.

showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of this animus.

Under *Wright Line*, if the General Counsel establishes a prima facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. The burden of persuasion then shifts to the employer to show that it would have taken the same adverse action even in absence of such activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399−403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *Serrano Painting*, 332 NLRB 1363, 1366 (2000); *Best Plumbing Supply*, 310 NLRB 143 (1993). To meet this burden, "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Serrano Painting*, supra at 1366, citing *Roure Bertrand Dupont, Inc.,* 271 NLRB 443 (1984).

Regarding Blue's May 11 suspension and May 16 written warning, Respondent was admittedly aware of his union activity as far back as December 2006. Animus against Blue is reflected in the series of internal management emails that expressed Respondent's alarm at efforts for unionization of the production employees, monitoring of Blue's union activities, and a desire to find a way to subject him to discipline him for such. Two were particularly telling. First was HR Manager John Plenzler's December 19, 2006 email, which requested that management at the facility investigate Blue's union activities to see if there was a way he could be subject to discipline. Second was Supervisor Eric Plenzler's July 27 email, which referred to union activity at the facility and then indicated that Blue had been disciplined for trying to get the names of all of the hourly people to provide to the Union. Based on these facts, I conclude that the General Counsel has made out a prima facie case that the suspension and warning were discriminatory.

The next step under *Wright Line* is determining whether Respondent would have taken the same action in the absence of Blue's protected union activity. Put another way, has Respondent established Blue was properly disciplined for unprotected conduct?

I do not so conclude. I find distinguishable *Roadway Express, Inc.*, 271 NLRB 1238, 1239 (1984), cited by Respondent in its brief (at 36–37) for the proposition that Blue's attempts to obtain employees' names and phone numbers from the gap leaders were unprotected. In that case, the employee had gone into a private office and taken bills of lading from the employer's files, to copy and provide to a union. In finding his activity unprotected, the Board emphasized that he was misappropriating financial information to which the employer had a strong confidentiality interest. *Ridgely Mfg. Co.*, 207 NLRB 193 (1973), also cited by Respondent (Br. at 37), does stand for the proposition that an employee is not protected in obtaining a list from an employer's records surreptiously. However, the case also states that an employee is protected when he/she requests such information, as opposed to coming into possession of the assertedly confidential material. See also *Mast Advertising & Publishing,* 304 NLRB 819, 828 (1991). Here, Blue requested the information from two gap leaders who had access, in the regular course of their duties, to the office in which the records were kept.

Even assuming arguendo that Blue's conduct in seeking employees' names and phone numbers was unprotected, the Company's internal emails make it clear that Respondent expressed hostility toward Blue for his union activity months previously. I have to conclude that Respondent's motive for disciplining Blue in May was based at least in substantial part on his soliciting coworkers to support the Union, activity that went back to December 2006, and was undeniably protected. Accordingly, his suspension violated the Act, even assuming arguendo that his attempts to obtain employees' names and phone numbers were unprotected.

Significantly, during the 2-year period from July 26, 2005–July 26, 2007, Respondent has disciplined only one other employee for violating the Company's harassment/sexual harassment policy, and that was for making racist remarks. Indeed, the provision in question addresses "unlawful harassment (racial, national origin, color, disability, religious, age, sexual, sexual orientation) of employees, including implied or expressed forms of sexual harassment." Blue's asking two gap leaders for employees' names and phone numbers with the avowed purpose of passing the information on to the Union can hardly be deemed "unlawful." The record further reflects that no employee other than Blue has been disciplined for breaching either Respondent's confidentiality or work environment policies.

I again note Respondent's failure to show by any direct evidence that the manner in which Blue sought the information was sufficiently egregious to render his conduct unprotected.

In sum, I conclude that Respondent has failed to show that it would have suspended Blue on May 11, and issued him a written warning on May 16, in the absence of his engagement in protected union activity. Accordingly, such conduct violated Section 8(a)(3) and (1) of the Act.

Turning to Montez, the pivotal question is whether a prima facie case has been established. I have not credited his testimony that he wore a union T-shirt to work in December 2006, and that Caccioppo told him to take it off or cover it. Nor have I credited his testimony that he voiced his support for the Union at the March 2007 meeting that Caccioppo conducted. Blue was the only witness who corroborated Montez' claim that he talked about the Union with other employees, and Blue testified that he, not Montez, initiated their conversations on the subject. There is nothing in the record to show that the "Platinum Club" wristwatch that Montez wore clearly reflected its relationship to the UAW or was conspicuous enough to have been reasonably observed by management. Caccioppo, Lovejoy, and Plenzler all denied that they had any knowledge of Montez' union support or activities at the time of his discharge.

The General Counsel (GC Br. at 28 fn. 16) urges reliance on the "small-plant doctrine" for inferring Respondent's knowledge of Montez' union activity (aside from the December 2006

and March incidents in which he allegedly expressed union support directly to management). However, as noted in Respondent's brief (at 5 fn. 1), the standard for applying the doctrine is that the employee's activity was "carried on in such a manner, or at times that in the normal course of events, the employer must have known about them." *Coral Gables Convalescent Home*, 234 NLRB 1198, 1199 (1978). See also *Elmwood Nursing Home*, 238 NLRB 346, 347 (1978). Because Montez was not a reliable witness on major matters, and in the absence of corroboration regarding the extent of his alleged union activity, I cannot conclude that application of the small-plant doctrine is appropriate.

As opposed to Blue, there is no direct evidence of Respondent's animus toward Montez on account of union activity. In the absence of direct evidence of animus, discriminatory motive may be inferred from circumstantial evidence and the record as a whole. *Verizon*, 350 NLRB 542, 550 (2007); *Tubular Corp. of America*, 337 NLRB 99, 99 (2001). See also *Davis Supermarkets v. NLRB*, 2 F.3d 1162, 1168 (D.C. Cir. 1993), cert. denied 511 U.S. 1003 (1994).

Such a conclusion is not warranted here. First, crediting Montez, Respondent (Caccioppo, specifically) knew that he was prounion in December 2006. Yet, he was made a permanent employee in February, and in March, his penalty for a safety violation that posed a potential threat to other employees was only a written warning. Had Respondent possessed a desire to retaliate against Montez for protected activity, it could have taken action earlier. Additionally, Respondent has terminated other employees for violation of "no tolerance" policies. Three individuals were terminated for job abandonment at TW. Moreover, Finley was also terminated for violating another "no tolerance" policy, use of drugs or alcohol, and he had 8 months of permanent status at the time, whereas Montez had been permanent for only a little over a month.

The discrepancies that I have noted in the testimony of Respondent's witnesses concerning who made the final decision to terminate Montez are insufficient, standing alone, to establish inferred discriminatory motivation.

I am cognizant of certain mitigating aspects of Montez' conduct on March 23. I do not believe that he "walked off the job" as that term is normally construed or that he deliberately flaunted company policy. Rather, he left 41 minutes early under an apparent misconception that he had provided Samples with notice. However, the fact remains that Samples reported to management that he left work on March 23 without proper notification, an offense for which the work rules specified automatic termination as the penalty.

In any event, my role is not per se to assess the appropriateness of the discipline that Respondent imposed but to determine whether its proffered reasons were pretextual, and the real motivation was Montez' union activity. See *Intermet Stevensville*, 350 NLRB 1349, 1360 (2007); *Detroit Paneling Systems*, 330 NLRB 1170, 1171 fn. 6 (2000). Since the necessary elements of knowledge and animus have not be established, the General Counsel has not made out a prima facie case that Montez was terminated for union activity, and I recommend that the allegation be dismissed.

ORDER

The Respondent, Faurecia Exhaust Systems, Inc., Toledo, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Requiring employees to obtain management's permission before they distribute union literature in nonwork areas (including the lunchroom, apart from the bulletin boards) on nonworktime, and threatening employees with termination if they engage in that activity without such permission.

(b) Issuing warnings to, suspending, or otherwise disciplining employees because they engage in activities on behalf of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Region 2-B, or any other labor organization.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the rule announced on July 26, 2007, that employees must obtain management's permission before they can post union literature in the lunchroom, apart from the bulletin boards.

(b) Within 14 days from the date of the Board's Order, remove from its files any references to the May 11, 2007 suspension, and the May 16, 2007 written warning, issued to Marvin Blue, and within 3 days thereafter, notify him in writing that this has been done and that the suspension and warning will not be used in any way against him.

(c) Within 14 days after service by the Region, post at its facility at Toledo, Ohio, copies of the attached notice marked "Appendix A."[32] Copies of the notice, on forms provided by the Regional Director for Region 8 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 11, 2007.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 8 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[32] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT require you to obtain management's permission before you distribute union literature in nonwork areas (including the lunchroom, apart from the bulletin boards) on your nonworktime, and WE WILL NOT threaten you with termination if you engage in such activity without management's permission.

WE WILL NOT issue you written warnings, suspend you, or otherwise discipline you because you engage in activities on behalf of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Region 2-B, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the National Labor Relations Act, as set forth at the top of this notice.

WE WILL rescind the rule announced on July 26, 2007, that you must obtain management's permission before you post union literature in the lunchroom, apart from the bulletin boards.

WE WILL remove from our files any reference to the unlawful suspension and warning of Marvin Blue, and within 3 days thereafter notify him in writing that this has been done and that the suspension and warning will not be used against him in any way.

FAURECIA EXHAUST SYSTEMS, INC.